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BINTANG GARMENT SUPPLIER SDN BHD

v.

HYTEX INTERGRATED BHD & ANOTHER CASE

B

HIGH COURT MALAYA, KUALA LUMPUR
KAMALUDIN MD SAID JC
[CIVIL SUITS NO: S-22-241-2010 & S-22-631-2010]
17 DECEMBER 2013

C ***CIVIL PROCEDURE:*** *Pleadings - Defence - Admission of fault by defendant - Doctrine of res ipsa loquitur - Whether applicable - Whether requirements for application of doctrine of res ipsa loquitur satisfied - Whether defendant rebutted inference of negligence - Rules of Court 2012, O. 33 r. 2*

D

CIVIL PROCEDURE: *Pleadings - Admission of facts in defence - Admission in statement of defence that fire 'berlaku' - Whether 'berlaku' carried meaning of 'broke out' - Whether meaning of Bahasa Malaysia version of statement of claim prevails over translated version - Whether* E *defendant bound by admission - Rules of Court 2012, O. 33 r. 2*

WORDS AND PHRASES: *'broke out' - Admission in statement of defence that fire 'berlaku' - Whether 'berlaku' carried meaning of 'broke out' - Whether meaning of Bahasa Malaysia version of statement of claim prevails over translated version*

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Starhome Realty Sdn Bhd was the landlord for Lot No. 19 and Lot No. 20 which were rented out to Bintang Garment Sdn Bhd and Hytex Integrated Bhd ('defendant') respectively. The two premises were separated by a common wall. Sometime in 2007, a G fire occurred and burnt both Lot No. 19 and Lot No. 20. Starhome Realty Sdn Bhd and Bintang Garment Sdn Bhd ('the plaintiff') commenced separate actions against the defendant. The plaintiff claimed that the defendant had, in its defence, admitted that the fire broke out at the defendant's premise, Lot H No. 20 and thus, the doctrine of *res ipsa loquitur* applied. The plaintiff, therefore, filed an application pursuant to O. 33 r. 2 of the Rules of Court 2012 ('ROC') for the court's determination of the issue whether by way of pleadings, to wit, the statement of claim and the defence, it could be found as a fact, that the fire I which had caused a total destruction to Lot No. 19 and Lot

No. 20 broke out from Lot No. 20 and burnt both lots. The plaintiff submitted that the issue could be disposed of without full trial. However, the defendant submitted that the doctrine of *res ipsa loquitur* is not applicable in fire accident cases and the determination of the question whether the fire 'broke out' in Lot 20 itself did not constitute an automatic right for the plaintiff to rely on the doctrine of *res ipsa loquitur*. The defendant further contended that the literal and dictionary meaning of the word 'berlaku' was not equivalent to 'broke out' as claimed by the plaintiff.

Held (entering judgment against defendant in respect of liability):

(1) The application under O. 33 r. 2 of the ROC was appropriate in the circumstances of the case. The determination of the issue as a preliminary issue will be decisive of the whole litigation or essentially the main part of the suit, resulting in a substantial saving of time and costs. Therefore, the plaintiff's application under O. 33 r. 2 was allowed. (paras 57, 58 & 81)

(2) The maxim of *res ipsa loquitur* is always applicable to fire cases (*Drake v. Harbour and Another*; *Shimizu Corporation v. Lim Tiang Chuan & Anor*; *Yong Gye Thiam v. Bong Pin Nyen*) and is still applicable in Malaysia. To hold that *res ipsa loquitur* is not applicable in the present case will go against the authorities and precedents of Malaysia, Singapore and United Kingdom. (paras 32-37)

(3) In its pleadings, the defendant had admitted that the fire 'berlaku' from Lot 20. Although the defendant contended that the Bahasa Malaysia word 'berlaku' does not carry the meaning of 'broke out' in English, it had translated the word 'berlaku' as 'broke out' in the pleadings. The meaning of the Bahasa Malaysia version of the statement of claim should prevail over the translated version of the statement of claim. As the defendant was bound by its admission, the defendant could not allege otherwise in the trial. (paras 56, 61 & 69)

(4) The requirements for the application of the doctrine of *res ipsa loquitur* were satisfied which rendered the doctrine applicable. It was satisfied that the fire would not have broke out in the defendant's premise if the defendant's premise was safe from

A any hazards which will cause fire; the defendant's premise was fully controlled by the defendant and there was no evidence as to why or how the fire occurred. The onus had therefore shifted to the defendant to rebut the inference of negligence that had arisen. (paras 72 & 73)

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(5) The defendant relied on the defence of 'act of God' in its pleadings. However, there were no particulars of what type of 'act of God' that the defendant was relying on. The defendant also did not plead any allegation and/or particular regarding
C the due diligence it had exercised in ensuring the safety of the premises. Therefore, the defendant could not lead any evidence to prove the 'act of God' and his due diligence. The defendant had nothing to disprove the alleged negligence and hence, had no defence to the plaintiff's action. (paras 76 & 80)

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Case(s) referred to:

Balfour v. Barty-King and Anor (Hyder & Sons (Builders) Ltd Third Parties) [1957] 1 All ER 156 ***(refd)***

Becquet v. Mac Carthy [1831] 2 B & Ad 951 ***(refd)***

Drake v. Harbour and Another [2007] EWHC 1670 ***(foll)***

E *Filliter v. Phippard [1847] 11 QB 347* ***(refd)***

Krishnan Rajan N Krishnan v. Bank Negara Malaysia & Ors [2003] 1 CLJ 388 HC ***(refd)***

Lembaga Kemajuan Tanah Persekutuan v. Tenaga Nasional Bhd [1997] 1 LNS 423 HC ***(refd)***

Leong Bee & Co v. Ling Nam Rubber Works [1970] 1 LNS 59 PC ***(not foll)***

F *MA Clyde v. Wong Ah Mei & Anor [1970] 1 LNS 73 FC* ***(refd)***

Mason v. Levy Auto Parts of England Ltd [1967] 2 QB 530 ***(refd)***

Mulholland & Tedd Ltd v. Baker [1939] 3 All ER 253 ***(refd)***

Musgrove v. Pandelis [1919] 1 KB 314 ***(refd)***

Ng Ah Ba & Ors v. Ramanda Sdn Bhd [1996] 1 CLJ 738 CA ***(refd)***

G *Sabah Shell Petroleum Co Ltd & Anor v. The Owners Of And/Or Any Other Persons Interested In The Ship Or Vessel The 'Borcos Takdir' [2011] 9 CLJ 426 HC* ***(refd)***

Shimizu Corporation v. Lim Tiang Chuan & Anor [1993] 3 SLR 77 ***(foll)***

Teng Ah Kow & Anor v. Ho Sek Chiu & Ors [1993] 3 SLR 769 ***(refd)***

Teoh Guat Looi v. Ng Hong Guan [1998] 4 CLJ 416 CA ***(refd)***

H *Teoh Meng Keat & Anor v. Penny Ann Monomomy Dawson [2011] 1 LNS 251 HC* ***(refd)***

UDA Holdings Bhd v. Melewar Leisure Sdn Bhd [2008] 10 CLJ 622 HC ***(refd)***

Williams v. Owen [1955] 1 WLR 1293 ***(refd)***

Yong Gye Thiam v. Bong Pin Nyen [2008] 8 CLJ 70 HC ***(foll)***

I *Yung Kong Co Bhd v. HHH Tyre Retreading Sdn Bhd & Another Case [2009] 4 CLJ 424 HC* ***(refd)***

Legislation referred to:
Rules of Court 2012, O. 18 r. 8, O. 33 r. 2

Fires Prevention (Metropolis) Act 1774 [UK], s. 86

For the plaintiff - Gan Khong Aik; M/s Gan Partnership
For the defendant - Leslie Bala; M/s Othman Hashim & Co

Reported by S Barathi

JUDGMENT

Kamaludin Md Said JC:

Introduction

[1] This is the plaintiffs' application pursuant to O. 33 r. 2 of the Rules of Court 2012 ("ROC") the for court's determination of the following proposed issue:

> Whether by way of pleadings to wit the Statement of Claim and the Defence, it can be found as a fact, whether undisputed or admitted, that on 19.2.2007 the fire which had caused a total destruction to No. 19, Jalan E 1/4 Kawasan Perindustrian Taman Ehsan, 52100 Kuala Lumpur ("Lot No. 19") and No. 20, Jalan E 1/4 Kawasan Perindustrian Taman Ehsan, 52100 Kuala Lumpur ("Lot No. 20") was broke out from Lot No. 20 which was occupied by the Defendant and burnt out both Lot No. 19 and Lot No. 20?

Facts Of The Case

[2] Starhome Realty was the landlord for Lot No. 19 and Lot No. 20. Lot No. 19 and Lot No. 20 are two adjoining premises which are separated by only one common wall shared by both premises. In year 2005, Bintang Garment has rented Lot No. 19 from Starhome Realty for stock storage purposes. In year 2005, Starhome Realty rented Lot No. 20 to the defendant, Hytex Intergrated Bhd for the latter to use the premise as a garment store room. On 19 February 2007, a fire occurred and had burnt out both Lot No. 19 and Lot No. 20 ("the fire").

Applicability Of *Res Ipsa Loquitur* In Fire Incident

[3] The plaintiff claims that the defendant in its defence admitted that fire was broke out at the defendant's premises and when it is admitted, the doctrine of *res ipsa loquitur* would apply. Pursuant

to O. 33 r. 2 of the Rules of Court 2012, the issue can be disposed of without full trial of this suit. Thus, resulting in a substantial saving of time and cost as it will significantly cut down the costs and time involved in pre-trial preparation or in connection with the trial proper.

[4] The defendant submitted that the doctrine of *res ipsa loquitur* is not applicable in fire accident cases. The determination of the question whether the fire "broke out" in Lot 20 itself does not constitute an automatic right for the plaintiff to rely on the doctrine of *res ipsa loquitur*.

[5] The defendant cited the case of *Leong Bee & Co v. Ling Nam Rubber Works* [1970] 1 LNS 59; [1970] 2 MLJ 45, where the Privy Council agreed with the Federal Court decision and held at p. 46 the following:

> Counsel for the appellants conceded in argument and their Lordships do not doubt rightly conceded, that in Malaysia the common law presumption referred to in *Becquet v. Mac Carthy* at p. 958, *Musgrove v. Pandelis* and *Mason v. Levy Auto Parts of England Ltd*, that a fire which began on a man's property arose from some act or default for which he was answerable, has no application in Malaysia at least since the coming into force of the Civil Law Ordinance, 1956, s. 3.

[6] The Privy Council further held that it is the plaintiffs' responsibility at trial to establish without the aid of the presumption the following:

(a) that the defendant or some person for whose conduct they were answerable had been guilty of some negligent act or omission which was a cause either of the commencement of the fire or of its spreading to the plaintiffs' premises; or

(b) that the defendants had caused or permitted to exist on their premises a source of fire danger constituting a material injury to the plaintiffs' property.

[7] The Privy Council decision has been consistently followed in subsequent cases involving fire incident. (*Lembaga Kemajuan Tanah Persekutuan v. Tenaga Nasional Bhd* [1997] 1 LNS 423; [1997] 2 MLJ 783).

[8] In *Teoh Meng Keat & Anor v. Penny Ann Monomomy Dawson* [2011] 1 LNS 251, the court held as follows: A

> *Res ipsa loquitur* envisages that proof of actual negligence or omission is to be dispensed with. This clearly runs contradictory to our existing common law which required the actual proof of negligence or omission and it is undoubtedly irreconcilable. To allow the principle to apply in such cases would be to revive the old presumption which has long been discarded and such proposition would be to displace our common law. I cannot find any rationale to accede to such proposition. To echo the words of Lord Normand in *Barkway* (*supra*), *res ipsa loquitur* is no more than a rule of evidence affecting onus and it is based on common sense principally to do justice. It is thus non substantive in that sense when compared to the actual burden of proof that is required to be satisfied ie, that the failure to comply with such basic burden of proof will mean that the Plaintiff would have failed to prove his case as a whole as compared to the onus of proof which may constantly shift from one to the other pertaining to the evidential aspect canvassed by respective party from time to time, [see *International Times & Ors v. Leong Ho Yuen* (*supra*)]. In the light of the specific requirement of proof of some act of negligence for cases involving fire without any aid of presumption, *res ipsa loquitur*, the general rule of evidence affecting onus, in my opinion, must give way to this specific burden of proof in line with our common law. In the circumstances, I am of the view that the principle of *res ipsa loquitur* which has the effect of reviving the aforesaid old presumption of law that is no longer applicable, does not apply in cases or claims arising out of a mere occurrence of fire, the Plaintiff must still bear the burden of proof and he must establish without the assistance of any presumption some negligent acts or omissions on the part of the defendant which caused the fire or its spreading.

B C D E F G

[9] Based on the above, it was the contention of the defendant that *res ipsa loquitur* is no longer applicable in Malaysia particularly in cases of a mere occurrence of fire. The plaintiff is therefore not entitled to rely on *res ipsa loquitur*. It is incumbent on the plaintiff to prove that the fire is caused negligently by the defendant. Hence, the plaintiffs' application for judgment to be entered based on *res ipsa loquitur* is indeed flawed and hence will not substantially dispose of the cause or matter. H

[10] The plaintiff submitted that both *Lembaga Kemajuan Tanah Persekutuan* and *Teoh Meng Keat* are decided by following the Privy Council's decision in *Leong Bee*. The relevant principles are: I

A the common law presumption referred to in *Becquet v. Mac Carthy* (1831) 2 B & Ad 951 at p. 958 at p. 958, *Musgrove v. Pandelis* [1919] 1 KB 314 at p. 317 and *Mason v. Levy Auto Parts of England Ltd*, [1967] 2 QB 530 at pp. 538, 539 that a fire which began on a man's property arose from some act or default for which he was answerable, has no application in MALAYSIA and B has had no application there at least since the coming into force of the Civil Law Ordinance, 1956, s. 3. The reason is that having been displaced by statute, first by 6 Anne c 31, s. 6 and later by the Fires Prevention (Metropolis) Act 1774, 14 Geo, 3, c 78, s. 86, the presumption formed no part of the common law C of England as administered in England at that date.

[11] In short, the above cases held that the common law presumption referred to in *Becquet v. Mac Carthy* [1931] 2 B & Ad 951, *Musgrove v. Pandelis* [1919] 1 KB 314 and *Mason v. Levy* D *Auto Parts of England Ltd* [1967] 2 QB 530 is not applicable in Malaysia as such presumption have been displaced by the Fires Prevention (Metropolis) Act 1774, 14 Geo, 3, c 78, s. 86.

[12] In reply to the above argument, plaintiff submitted that:

E (i) the Fires Prevention (Metropolis) Act 1774 ("the Fires Prevention Act") does not apply to cases premised upon the cause of action of negligence; and

(ii) the common law presumption that have been displaced by the F Fires Prevention Act is different from the maxim of *res ipsa loquitur*.

The Scope Of The Fires Prevention (Metropolis) Act, 1774

[13] The Privy Council in *Leong Bee* case held that s. 86 of the G Fires Prevention (Metropolis) Act 1774 has displaced the common law position. The said s. 86 says:

> **86. No action to lie against a person where the fire accidently begins**
>
> H And ... no action, suit or process whatever shall be had, maintained or prosecuted against any person in whose house, chamber, stable, barn or other building, or on whose estate any fire shall ... accidently begin, nor shall any recompense be made by such person for any damage suffered thereby, any law, usage I or custom to the contrary notwithstanding ... provided that no contract or agreement made between landlord and the tenant shall be hereby defeated or made void.

[14] In *Williams v. Owen* [1955] 1 WLR 1293, the court held that by "accidentally" it meant "without negligence". A

[15] In *Balfour v. Barty-King and Anor (Hyder & Sons (Builders), Ltd Third Parties)* [1957] 1 All ER 156, the Court of Appeal after referring to *Musgrove v. Pandelis* and *Filliter v. Phippard* held that: B

> ... it is clear from these last two cited cases that where the fire is caused by negligence, it is not to be regarded as accidental.

[16] Hence, the Court of Appeal in *Balfour* agreed with *Musgrove v. Pandelis*, that: C

> The statute which protects the householder in the case of an accidental fire leaves the other heads of liability at common law untouched.

[17] In *Filliter v. Phippard* [1847] 11 QB 347, it was held that the Fires Prevention Act does not apply where a fire is caused by negligence. D

[18] It was submitted that the present cases premised upon the cause of action of negligence however all the above cases have illustrated that the Fires Prevention Act does not apply to fire caused by negligence. Hence to say that the Fires Prevention Act has altered the common law position and thereby the maxim of *res ipsa loquitur* is no longer applicable in fire caused by negligence has gone beyond the ambit of the Fires Prevention Act. E F

Opinion Of The Court

[19] I agree with the submission by plaintiff's counsel that the common law presumption that was displaced by the Fires Prevention Act is a complete different legal concept from the maxim of *res ipsa loquitur*. G

The Common Law Presumption That Was Displaced By The Fires Prevention Act

[20] The common law's position (prior to the enforcement of the Fires Prevention (Metropolis) Act 1774) as regards to the liability of a person by whose house a fire spread to his neighbour's property can be found in cases cited below. H I

[21] In *Filliter v. Phippard* [1847] 11 QB 347, Court of Queen's Bench held that:

> The ancient law, or rather custom of England, appears to have been, that a person by whose house a fire originated, which afterwards spread to his neighbour's property and destroyed it, MUST make good the loss.

[22] In *Mulholland & Tedd Ltd v. Baker* [1939] 3 All ER 253:

> At common law the liability for injury done to a neighbour by fire escaping from one's own premises was a strict liability, independent of negligence. However, by reason of the Fires Prevention (Metropolis) Act, 1774, which exempts the Defendant in the case of a fire beginning on his premises "accidently" (a term which has been construed to mean "without negligence"), a Plaintiff must now establish negligence.

[23] In *Musgrove v. Pandelis* [1919] 1 KB 314, it was held by Lush J that:

> The purpose of this legislation (ie, the Fires Prevention Act) I would point out was to remove the common law presumption that a fire which was not proved to have been caused by some other person was caused or kindled by the householder, and to free him from liability for fires accidentally begun.

[24] In *Becquet v. Mac Carthy* [1831] 2 B & Ad 951:

> ... By the law of this country before it was altered by statute 6 Anne, c. 31, s. 6, if a fire began on a man's own premises, by which those of his neighbour were injured, the latter, in an action brought for such an injury, would not be bound in the first instance to show how the fire began, but the presumption would be (unless it were shown to have originated from some external cause) that it arose from the neglect of some person in the house ("the Common Law Presumption").

[25] Referring to the above cases, plaintiff was right that before the Fires Prevention Act came into force, under the common law, damage arising from a fire which had spread from the defendant's land to property belonging to the plaintiff is a strict liability (independent of negligence) whereby the plaintiff does not bound to prove defendant's negligence despite the defendant must make good the loss.

[26] In the premises, one will be able to distinguish the maxim of *res ipsa loquitur* from the above mentioned common law presumption.

[27] As stated by Justice NH Chan JCA in the case of *Teoh Guat Looi v. Ng Hong Guan* reported in [1998] 4 CLJ 416 at p. 421; [1998] 4 MLJ 525 at p. 528:

> … *res ipsa loquitur* was in essence no more than a common sense approach to the effect of the evidence in certain circumstances. It means that a plaintiff *prima facie* establishes negligence where (i) it is not possible for him to prove precisely how the accident happened, but (ii) on the evidence as it stands, he manages to show that the accident could not have happened without negligence on the part of the defendant.

[28] In *MA Clyde v. Wong Ah Mei & Anor* [1970] 1 LNS 73; [1970] 2 MLJ 183, the Federal Court held that the maxim of *res ipsa loquitur* is not a principle of substantive law but a rule of evidence. Gill FJ said:

> The maxim, however, is not a principle of substantive law but a rule of evidence. In this connection, Lord Simonds in *Woods v. Duncan* said:
>
> But to apply this principle is to do no more than shift the burden of proof. A *prima facie* case is assumed to be made out which throws upon him the task of proving that he was not negligent.

[29] The differences between the common law presumption and the maxim of *res ipsa loquitur* is illustrated in the table below:

	The Common Law Presumption	*Res Ipsa Loquitur*
Scope	Only applies to fire case involving damage caused by fire spread to the Plaintiff's property from the Defendant's land	Applicable to any kind of cases involving negligence (if the facts allow)
Nature	A principle of substantive law which laid that the liability for injury done to a neighbour by fire escaping from one's own premises was a strict liability, independent of negligence.	Not a principle of substantive law but a rule of evidence that applicable in the cases of negligence

Effect of application	Strict liability. The Defendant is liable and must make good of loss	Do no more than shifting the burden of proof to the Defendant for him to prove that he is not negligent. If the Defendant can disprove the alleged negligence, the Defendant is not liable.

[30] Based on the above illustration, the said presumption and the maxim of *res ipsa loquitur* are completely two distinct concepts.

[31] Hence, the plaintiff was right in saying that the defendant's argument that by reason of the Privy Council's decision in *Leong Bee & Co v. Ling Nam Rubber Works* [1970] 1 LNS 59; [1970] 2 MLJ 45, *res ipsa loquitur* is not applicable in Malaysia is misconceived. The Privy Council merely held that the common presumption in *Becquet v. Mac Carthy*, *Musgrove v. Pandelis* and *Mason v. Levy* is not applicable. It had never to any extent held that *res ipsa loquitur* as a rule of evidence is thereby being abandoned in all fire cases in Malaysia.

The Application *Res Ipsa Loquitur* In Fire Cases In England, Singapore And Malaysia

[32] In *Drake v. Harbour and Another* [2007] EWHC 1670, the claimant engaged the defendants to carry out electrical work at her bungalow whilst she stayed elsewhere. A fire broke out in the course of the works, and the claimant brought proceedings to recover damages. As to causation, the judge decided that the maxim '*res ipsa loquitur*' applied as the defendants were in sole control of the bungalow when the fire broke out and that the defendants therefore had an evidential burden to discharge. The court held:

> The Claimant relies on the maxim *res ipsa loquitur*, on the basis that the Defendants were in the sole control of the bungalow and roof space and on the available evidence it is more likely than not that the effective cause of the accident was the act or omission of the Defendants, which act or omission constituted a failure to take proper care of the Claimant's safety. In *Lloyde v. West Midlands Gas Board* (CA) 1 WLR page 749, at page 755B Megaw LJ said:
>
> > I doubt whether it is right to describe *res ipsa loquitur* as a "doctrine". I think that is no more than an exotic, but convenient, phrase to describe what is in essence no more

than a common sense approach, not limited by technical rules to the assessment of the effect of evidence in certain circumstances. It means that a plaintiff *prima facie* establishes negligence where:

(i) it is not possible for him to prove precisely what was the relevant act or omission which set in train the events leading to the accident; but

(ii) on the evidence as it stands at the relevant time it is more likely than not that the effective cause of the accident was some act or omission of the defendant or of someone for whom the defendant is responsible, which act or omission constitutes a failure to take proper care for the plaintiff's safety.

The state of the evidence at the end of this case is that an evidential burden is established by the Claimant's case. No causation inconsistent with the negligence of the Defendants has been established which shows an operative cause, at least as likely as that the Defendant failed to check that the insulation was not unacceptably damaged, or that any existing damage was not exacerbated by their activity in assembling the light fittings onto the cable.

[33] The decision of *Drake v. Harbour* is affirmed by the England's Court of Appeal.

[34] In Singapore, the maxim of *res ipsa loquitur* is applied in *Shimizu Corporation v. Lim Tiang Chuan & Anor* [1993] 3 SLR 77. In that case, a fire broke out which totally destroyed and gutted the defendants' building and partially damaged the plaintiffs' building. The plaintiffs instituted this action against the defendants claiming damages alleging that the fire was caused by the negligence of the defendants and/or their servants or agents as owners and occupiers of the building. In that case:

(a) On the evidence before the court and on the balance of probabilities, the true cause of the fire could not be established. The court however was satisfied on the balance of probabilities that the fire originated from the defendants' building.

A (b) As the defendants had possession and were in occupation of their building and the fire started in the defendants' building and spread to the plaintiffs' building, the inference to be drawn was that the fire could not have started without some lack of care on the part of the defendants.

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(c) Since the defendants were unable to displace the inference that the fire was caused by their negligence or that of their servants or agents, the plaintiffs' claim against the defendants for damages for negligence succeeded.

C

[35] In the Malaysia's case of *Yong Gye Thiam v. Bong Pin Nyen* [2008] 8 CLJ 70; [2007] MLJU 761, a fire broke out in the appellant's house and it spread over to the respondent's house. The High Court upheld the decision made by the session court, which says:

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> The fire started in his house and spread to the plaintiff's house. There was no explanation as to how the fire started. Without negligence of somebody, the fire outbreak on the defendant's house would not have happened in the ordinary course of things. In the circumstances, the inference to be drawn in that the fire could not have started without negligence on the part of the defendant, his servants or agents in the defendant's house. There for it was for the defendant to show that the fire was accidental and could have occurred without the negligence and that of his servants or agents.

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[36] The High Court Judge said:

> Having read and re read the grounds of the SCJ for his decision, I am of the view that the SCJ had come to the correct decision and my reasons are these:
>
> (1) The fire had started from the Defendant's house.
>
> (2) The Defendant had used his house as a lodging place for rental to various families despite the fact that the house was basically a residential property.
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> (3) Despite making his house into a lodging place, the Defendant did not take any precaution of any nature to prevent an outbreak of fire. Precaution such as an examination of the electrical wires in the house in view of the fact of many users of the same which could have caused an overload. There was also no fire extinguisher placed in the vicinity of the house.

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(4) The fact that the Defendant had turned his house into a lodging house places a duty of care on him to ensure that no damage is caused to the neighbours.

(5) No license was obtained from the relevant authority to turn the house into a lodging place which would mean that the house did not comply with regulations such as section 3(b) of the Miri District Council (Prevention of Fire) By-Laws which provides that at least a gallon of water be made available for use in case of fire and Building Ordinance 1994 By Laws which requires fire extinguishers placed in the Defendant's house.

(6) There was no inspection by the Defendant to ensure that his tenants did not have any materials which are likely to cause an outbreak of fire.

(7) The Defendant at all times was in control of the Defendant's house.

(8) The above factors in my view were adequate for the SCJ to infer that the Defendant had caused the fire and to hold that if the Defendant wanted the court to believe that the fire was an accident, the burden was on him to do so which the Defendant had failed to do.

[37] From the above cases, it is clear that the maxim of *res ipsa loquitur* is always applicable to fire cases. I agree with the plaintiff's counsel that the maxim of *res ipsa loquitur* is still applicable in Malaysia. To hold that *res ipsa loquitur* is not applicable in the present case will go against the authorities and precedents of Malaysia, Singapore and United Kingdom as stated above.

Plaintiff's Application

[38] Plaintiff submitted that the proposed issue is a proper issue to be determined pursuant to O. 33 r. 2 of the ROC because the determination of such issue does not require any evidence to be adduced. It involves construction of pleadings only, nothing more.

[39] It is plaintiff's opinion that the defendant has through their defences admitted that the fire was broke out in the defendant premises.

[40] Contrary to the plaintiff's contention the defendant submitted that the determination of the proposed question/issue will not effectively answer the agreed issues and will not result in substantial saving of time and expenditure.

[41] It was submitted, regardless of whether the defendant has admitted or has not disputed in the pleadings that the fire started from Lot 20, the plaintiffs bear the burden to prove the elements of negligence as pleaded by the plaintiffs in their respective statement of claim.

[42] Here, the determination of the question whether the fire "broke out" in Lot 20 cannot properly be regarded that the plaintiffs have proved a *prima facie* case of negligence against the defendant.

[43] In *Yung Kong Co Bhd v. HHH Tyre Retreading Sdn Bhd & Another Case* [2009] 4 CLJ 424 at p. 438, the court held that the fact that the fire started at HHH Tyre (defendant in the case) grinding room is not enough proof of *prima facie* when both parties are disputing as to the cause of fire.

[44] Therefore, regardless of the applicability of the doctrine of *res ipsa loquitur*, the determination of the proposed issue would not substantially dispose of the cause or matter. Following that, the plaintiff's application should not be allowed.

The Law

[45] Order 33 r. 2 of the Rules of Court 2012.

> The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated ...

[46] In *Krishnan Rajan N Krishnan v. Bank Negara Malaysia & Ors* [2003] 1 CLJ 388, Abdul Malik Ishak J after referring the decision from the Supreme Court and Court of Appeal concludes as follows:

> ... the relevant principles governing an application under this rule can be distilled, *inter alia*, from these three cases:
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> (1) *Newacres Sdn Bhd v. Sri Alam Sdn Bhd* [1991] 3 CLJ 2781; [1991] 1 CLJ (Rep) 321 - a decision of the Supreme Court;
>
> (2) *Arab Malaysian Finance Bhd v. Meridien International Credit Corporation Ltd London* [1993] 4 CLJ 307 - another decision of the Supreme Court; and

(3) *Dominic J Puthucheary v. Jet Age Construction Sdn Bhd & Anor* [1997] 3 CLJ 807; *Module Construction Sdn Bhd & Ors v. Jet Age Construction Sdn Bhd & Anor* [1997] 3 CLJ 807 - a decision of the Court of Appeal.

…. The principles of law that can be distilled from the long line of established authorities may conveniently be marshalled in these terms:

(i) that the rule confers upon the court a wide discretionary power to order any question or issue in a cause or matter, whether of fact or law or partly of fact and partly of law, to be tried before, at or after the trial of the cause or matter;

(ii) that the application under O. 33 r. 2 of the RHC may not be appropriate where the facts are in dispute or where extrinsic evidence is required to be adduced;

(iii) that the overriding consideration, when taken in its correct perspective, is whether the application would result in a substantial saving of time and expenditure; and

(iv) that the court should be wary and warn itself against the abuse of this process.

Agreed Issues

[47] It has been agreed that the issues to be tried, *inter alia*, are as follows:

Whether the defendant has failed to:

(i) Prevent the defendant's premise from the fire?

(ii) Prevent the fire from spreading to the plaintiff's premise?

(iii) Warn and inform the plaintiff of the occurrence of the fire to enable the plaintiff to take immediate action against the spread of the fire to the plaintiff's premise;

(iv) Put out the fire immediately after the fire has occurred and to prevent the fire from escaping from the defendant's premise?

(v) Whether the plaintiff can rely on the doctrine of *res ipsa loquitur*?

[48] The proposed issue is whether by way of pleadings to wit the statement of claim and the defence, it can be found as a fact, whether undisputed or admitted, that on 19 February 2007 the

fire which had caused a total destruction to No. 19, and No. 20, was broke out from Lot No. 20 which was occupied by the defendant and burnt out both Lot No. 19 and Lot No. 20?

The Pleadings

[49] The relevant paragraphs of the pleadings are reproduced in the table below:

SUIT 241	
The Plaintiff's Statement of Claim	The Defendant's Defence
Paragraph 6 On or about 19.2.2007, a fire broke out in the Defendant's Premise resulting in a total destruction of the Plaintiff's Premise ("Fire"). Pada atau sekitar 19.2.2007, suatu kebakaran telah berlaku di Premis Defendan yang mengakibatkan kemusnahan keseluruhan kepada premis Plaintif ("Api").	Paragraph 3 Merujuk kepada perenggan 6 Pernyataan Tuntutan, kecuali mengakui bahawa kebakaran telah berlaku di premis Defendan pada 19.2.2007, Defendan tiada pengetahuan mengenai butir-butir kemusnahan dalam perenggan tersebut dan meletakkan Plaintif kepada dasar bukti yang kukuh dan ketat.
SUIT 631	
The Plaintiff's Statement of Claim	The Defendant's Defence
Paragraph 5 On or about 19.2.2007, a fire broke out in the Premise (ie, Lot No. 20 occupied by the Defendant) resulting in a destruction of Premises ("Fire"). Pada atau sekitar 19.2.2007, suatu kebakaran telah berlaku di Premis tersebut yang mengakibatkan kemusnahan keseluruhan kepada Premis ("Api").	Paragraph 2 Defendan mengakui perenggan-perenggan 1, 2, 3, 4, dan 5 Pernyataan Tuntutan Plaintif. Paragraph 7 Seterusnya, Defendan menyatakan bahawa kebakaran yang berlaku dari premis tersebut …

[50] Based on the above analysis, plaintiff claims that the defendant had admitted that "suatu kebakaran telah berlaku di premis tersebut". A

[51] The defendant averred that the defendant at all material time has not admitted that the fire which allegedly caused destruction to Lot 19 and Lot 20 was broke out from Lot 20. B

[52] It is the defendant's contention that the literal and dictionary meaning of the word "berlaku" is not equivalent to "broke out" as claimed by the plaintiff. C

[53] The defendant claims that it has specifically traversed para. 7 of the statement of claim whereby the plaintiffs alleged that the fire "berpunca" (caused) by the defendant. I agree with the defendant, however, in my opinion para. 6 of the plaintiff's statement of claim, which is in issue and unless the defendant says that the fire never "broke out" from his premise at Lot 20, then the fact is disputed and the burden is on the plaintiff to prove. D

[54] The defendant submitted that the word employed by the plaintiffs in the proposed question in the Bahasa Malaysia version is different from the word employed in their statement of claim. The plaintiffs employed the word "tercetus" which connotes the similar meaning of "broke out" in English but it is different from the word "berlaku" that was used in the statement of claim. E

[55] For the defendant, the accurate and precise meaning of words in the context of fire based on the dictionary meaning is illustrated in the table below: F

Bahasa Malaysia	English Meaning
"Berlaku" Sedang berlangsung atau berjalan	Exist in a specified place or conditions
"Berpunca" Berasal daripada, bersumber daripada	Source; place from which something comes or is obtained
"Tercetus" Timbul atau terjadi sesuatu keadaan	Outburst; outbreak; breaking out of ~

G H I

[56] Based on the submissions, I observe that the only disagreement is on the defendant's contention that the Malay word "berlaku" does not carry the meaning of "broke out" in English. Hence, this court will only need to look at the pleadings to find out the meaning of words used and to give effect to such words.

[57] Having analysed the pleadings and the agreed issue, I am of the opinion that the application under O. 33 r. 2 of the ROC is appropriate in circumstances of this case. The proposed issue for this court to determine will effectively answer the agreed issues and results a substantial saving of time and expenditure which otherwise would have to be expended should the action go to trial as a whole.

[58] Therefore, the plaintiffs' application under O. 33 r. 2 is allowed.

Fire Broke Up In The Premise

[59] Paragraph 6 of suit No. 241 and para. 5 of suit No 631, the plaintiff pleaded in Bahasa Malaysia as follows:

> Pada atau sekitar 19.2.2007, suatu kebakaran telah berlaku di Premis Defendan yang mengakibatkan kemusnahan keseluruhan kepada Premis Plaintiff.

(On about 19 February 2007, a fire broke out in the premise resulting in a total destruction of the premise)

[60] Paragraph 7 of suit 241 and para. 6 of suit No. 631, the plaintiff pleaded in Bahasa Malaysia as follows:

> Api berpunca daripada kecuaian Defendan, pekerja-pekerja atau ejen-ejen yang mempunyai kawalan dan pengurusan Premis tersebut pada semua masa yang material

(The said fire was caused by the negligence of the defend and employees or agents who had control and managed the defendant's premise at all material times).

[61] The words "tercetus" mentioned by the defendant is out of question because it was never found in the pleadings. The words "berlaku" has been translated in English as "broke out" from Lot 20. I agree with the defendant that the meaning of the Bahasa Malaysia version of the statement of claim should prevail over the translated version of the statement of claim.

[62] In the defence to para. 6 of suit No. 241 the defendant pleaded as follows: A

> Merujuk kepada perenggan 6 Pernyataan Tuntutan, kecuali mengakui bahawa kebakaran telah berlaku di premis Defendan pada 19.2.2007, Defendant tiada pengetahuan mengenai butir-butir kemusnahan dalam perenggan tersebut dan meletakkan Plaintif kepada dasar bukti yang kukuh dan ketat. B

[63] At para. 5 of suit No. 631 the defendant pleaded:

> Defendan mengakui perenggan-perenggan 1, 2, 3, 4, dan 5 Penyataan Tuntutan Plaintif. C
>
> Defendan menafikan perenggan 6 Pernyataan Tuntutan dan meletakkan Plaintif kepada bukti yang kukuh dan ketat. Seterusnya Defendan dan/atau pekerja/ejennya tidak ada apa-apa kawalan terhadap api kebakaran yang berlaku di kilang Defendan. Defendan juga menafikan segala butir-butir kecuaian dalam perenggan 6 Pernyataan Tuntutan Plaintif dan meletakkan Plaintif kepada bukti yang kukuh dan ketat. D

[64] Analysing the above pleadings, it is clear that the defendant admitted that the fire did exist at Lot 20 (mengakui kebakaran berlaku di premis defendan). E

[65] Exhibits "TTH-6" to "TTH-9" in the affidavit in reply of plaintiffs and submit that "broke out" is translated as "berlaku" in: F

(a) News reported by BERNAMA (see exh. TTH-7);

(b) Government Forms (see exh. TTH-8); and

(c) Legal cases reported by Current Law Journal (see exh. TTH-9).

[66] The above exhibits clearly show that "berlaku" has the same meaning as "broke out". G

[67] The defendant contended that it has specifically denied and put the plaintiffs to strict proof that the source of fire or the origin of the fire is from Lot 20. Furthermore, it is not within the agreed facts filed herein that the defendant has admitted that the fire broke out or originated or started from Lot 20. Therefore, it was submitted that the assertion that the defendant has admitted that the fire broke out or originated or started from Lot 20 is without foundation. H I

[68] In this application the proposed issue is whether by way of pleadings to wit the statement of claim and the defence, it can be found as a fact that on 19 February 2007 the fire which had caused a total destruction to No. 19, and No. 20, was broke out from Lot No. 20 which was occupied by the defendant and burnt out both Lot No. 19 and Lot No. 20?

[69] Having analysed the pleadings, I found that it is a fact that the defendant admitted fire "berlaku" from Lot 20. Since the defendant had admitted the fire "berlaku" in its premises, the defendant cannot in the trial allege the otherwise and deny that the fire was broke out in the defendant's premises. The defendant is bound by its admission.

[70] Plaintiff submits that when it is admitted that fire was broke out at the defendant's premises, the doctrine of *res ipsa loquitur* would apply and inference thereby be drawn against the defendant that the fire would not occur without negligence on the part of the defendant.

Doctrine Of *Res Ipsa Loquitur*

[71] In *Sabah Shell Petroleum Co Ltd & Anor v. The Owners Of And/Or Any Other Persons Interested In The Ship Or Vessel The 'Borcos Takdir'* [2011] 9 CLJ 426; [2012] 5 MLJ 515, it was held:

> *Res ipsa loquitur* allows a court to infer carelessness or negligence on the part of a Defendant where the claimant can show that the nature of the accident suggests both negligence and the Defendant's responsibility. The Latin term represents a rule of evidence and does not set forth a principle of law. As stated in *Clerk & Lindsell on Torts* (20th Edn.): …
>
> It is only a convenient and label to apply to a set of circumstances in which a claimant proves a case so as to call for a rebuttal from the defendant, without having to allege and prove any specific act or omission on the part of the Defendant. He merely proves a result, not any particular act or omission producing the result.
>
> *Res ipsa loquitur* which stems from the judgment of Erie CJ in *Scott v. London and St Katherine Docks* (1865) 3 H & C 596 applies where:
>
> (1) the occurrence is such that it would not have happened without negligence, and

(2) the thing that inflicted the damage was under the sole management and control of the defendant, or of someone for whom he is responsible or whom he has a right to control. If these two conditions are satisfied it follows, on a balance of probability that the defendant, or the person for whom he is responsible, must have been negligent.

There is, however, a further negative condition:

(3) there must be no evidence as to why or how the occurrence took place. If there is, then appeal to *res ipsa loquitur* is inappropriate for the question of the Defendant's negligence must be determined on that evidence.

[72] Applying the above principle to the present case:

(i) Fire would not broke out in the defendant's premises if the defendant's premises was safe from any hazards which will cause fire (fulfilled the first requirement);

(ii) The defendant's premises was fully controlled by the defendant (fulfilled the second requirement);

(iii) No evidence as to why or how the fire occurred (fulfilled the third requirement).

[73] Hence, the doctrine is applicable to the present case. As such the onus shifted to the defendant to rebut the inference of negligence that had arisen.

[74] In *Teng Ah Kow & Anor v. Ho Sek Chiu & Ors* [1993] 3 SLR 769, it was held that:

There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.

[75] At this juncture, the only issue to be determined by this court is whether the defendant has raised a valid defence to rebut the inference of negligence?

A **Defendant's Defence**

[76] The defendant relied on the defence of "act of God" in their pleadings but the defendant failed to provide any particulars in support of the "act of God".

B **[77]** Pursuant to O. 18 r. 8 of the ROC, the defendant must plead specifically any matters and to provide particulars of its defence, and in this case, to allege the particulars of the "act of God", when:

C (a) it would make the plaintiffs' claim not maintainable;

(b) if not specifically pleaded, might take the plaintiffs by surprise; or

D (c) it raises issues of fact not arising out of the preceding pleading.

as if the particulars of the "act of God" were not provided, the plaintiffs would not know what type of "act of God" that the defendant is relying on and the plaintiffs would be taken by E surprise as there was no such issues of fact in the plaintiffs' statement of claim.

[78] In the decision given by the Court of Appeal in *Ng Ah Ba & Ors v. Ramanda Sdn Bhd* [1996] 1 CLJ 738 at p. 739, the F court held that the party making the allegation is required to condescend to particulars. Otherwise, the defendant was only making a bare and sweeping allegation when no particulars of the alleged "act of God" have been disclosed.

G **[79]** Also, Abdul Malik Ishak J (now JCA) in *UDA Holdings Bhd v. Melewar Leisure Sdn Bhd* [2008] 10 CLJ 622 at p. 667; [2009] 2 MLJ 408 at p. 454, held that:

> The parties are certainly bound by their pleadings. It is a well settled principle of law that in the absence of pleadings, evidence H if produced by the parties cannot be considered and no party shall be permitted to travel beyond its pleadings and that all necessary and material facts should be pleaded by the party in support of his case before the court (*Ram Sarup Gupta (dead) by LRs, v. Bishun Narain Inter College & Ors* AIR 1987 SC 1242 and *K Kanakarathnam v. A Perumal & Anor* AIR 1994 Mad 247). No I evidence can be led on a fact that is not pleaded (*Hari Chand v.*

Daulat Ram AIR 1987 SC 94). Put differently, it is not open to the parties to give up the case set out in the pleadings and propound a completely new and different case (*Vinod Kumar v. Smt Surjit Kaur* AIR 1987 (Vol 74) SC 2179 at p. 2183).

[80] Here, there are no particulars on what type of "act of God" that the defendant is relying on and the defendant did not plead any allegation and/or particular regarding the due diligence that it had exercised in ensuring the safety of the premises. The defendant therefore cannot lead any evidence to prove the "act of God" and his due diligence; he then would have nothing to disprove the alleged negligence and hence has no defence to plaintiff's action.

Conclusion

[81] The determination of the issue as preliminary issues will be decisive of the whole litigation or essentially the main part of the suit. Thus, resulting in a substantial saving of time and cost as it will significantly cut down the costs and time involved in pre-trial preparation or in connection with the trial proper. In the circumstances the trial proper for this case is unnecessary and pursuant to O. 33 r. 2 of the Rules of Court 2012, I allow judgment is entered against the defendant in respect of liability.

[82] Issue on damages and assessment is referred to the Senior Assistant Registrar. Costs will follow after the proceeding.